

Before the  
Federal Communications Commission  
Washington, D.C. 20554

In the Matter of )  
 )  
Petition of Qwest Corporation for Forbearance )  
Pursuant to 47 U.S.C. § 160(c) in the Omaha ) WC Docket No. 04-223  
Metropolitan Statistical Area )  
 )

REPLY COMMENTS OF  
THE PENNSYLVANIA PUBLIC UTILITY COMMISSION

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## **Introduction**

The Pennsylvania Public Utility Commission (PaPUC) appreciates this opportunity to file Reply Comments with the Federal Communications Commission (FCC). These Reply Comments respond to the FCC Notice on the Petition of McLeodUSA Telecommunications Services, Inc. (McLeod Petition) at WC Docket No. 04-223 filed on July 30, 2007. Qwest Corporation, Inc. (Qwest) previously obtained FCC forbearance from wholesale facilities regulation requirements by FCC Order at this docket issued on September 15, 2005 (Qwest Forbearance Order). On July 30, the FCC published notice of the McLeod Petition and established a Comment and Reply Comment period of August 29, 2007 and September 13, 2007, respectively. Verizon has also filed for similar forbearance at WC Docket No. 06-172 (the Verizon Forbearance Petition).

As an initial matter, the PaPUC Reply Comments should not be construed as binding on the PaPUC or any individual Commissioner in any proceeding pending before the PaPUC. The positions taken in the Reply Comments could change in response to subsequent events, including developments at the state and federal levels.

## **The PaPUC Reply Comment**

The PaPUC Reply Comments support the Comments of Earthlink, Inc., Comptel, Eschelon and Integra, Covad, Telecomm Investors, and Texaltel. Those comments ask the FCC to reconsider, modify, or rescind the Omaha Forbearance Order.

The FCC must hold that any forbearance requests it grants does not undermine, modify, rescind, or preempt any condition or obligation imposed as a matter of independent state law on a recipient of FCC forbearance. Several considerations support this position, primarily the PaPUC's defense of its order approving the merger of Verizon and MCI now under appeal in our Supreme Court at 71 MAP 2007 and 72 MAP 2007, respectively (the PaPUC Merger Order).

The PaPUC has filed Comments and Reply Comments opposing Verizon's subsequently filed "me too" petition at WC Docket 06-127. In that docket, Verizon wants the FCC to forbear from Computer II and other obligations for Pennsylvania (which includes Northern Delaware and parts of New Jersey). As the PaPUC demonstrated in that docket, reliance on this forbearance is inadvisable because the pending Verizon petition goes well beyond the narrow scope of this forbearance.

Moreover, if the "predictive impact" results from this relatively limited forbearance are questioned because the results are contrary to what the FCC expected, there is simply no reason to use this decision to justify broader forbearance for Verizon. Forbearance in Pennsylvania, as in this docket, is inappropriate.

Forbearance could adversely impact Pennsylvania-specific conditions. Equally important, forbearance will undermine the ability of important competitive telecommunications services suppliers, who are Pennsylvania

employers in their own right, to continue providing competitive services in Pennsylvania.<sup>1</sup>

In addition, the PaPUC supports the Comments of Covad and Cavalier. Those providers are Pennsylvania employers. They provide competitive services, particularly in urban parts of Philadelphia. Their ability to provide these competitive services could also be at risk if this questionable forbearance stands as viable precedent to support a broader Verizon forbearance request for Pennsylvania.

The PaPUC also supports the Comment of Eschelon because they raise legitimate concerns about adverse impact on competitive suppliers and state employment. The Eschelon Comment demonstrates that forbearance can, and does, undermine investment and the ability to provide competitive services. Following forbearance in Omaha, Integra declined to enter the Omaha market and Eschelon simply refused to purchase McLeod's assets even though McLeod specifically sought out Eschelon as a buyer.<sup>2</sup> The PaPUC also raised a concern about similar impacts in Pennsylvania if the FCC grants forbearance in Pennsylvania.<sup>3</sup>

The forbearance granted in this case gravely concerns the PaPUC because of the adverse impact it may have on recent merger approvals. The

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<sup>1</sup> *In the Matter of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Philadelphia, Pittsburgh, Boston, New York City, Providence and Virginia Beach Metropolitan Statistical Areas*, WC Docket No. 06-172, Comments and Reply Comments of the PaPUC; *Motion of Covad Communications Group et. al for Expedited Order on Verizon Petition for Forbearance*, WC Docket No. 04-440, Reply to Comments of PaPUC, pp. 7-17.

<sup>2</sup> Comment of Eschelon, WC Docket No. 04-223, pp. 2-3.

<sup>3</sup> Comment of PaPUC, WC Docket No. 06-172, pp. 8-12.

PaPUC is very concerned that reliance on the forbearance granted in this docket under 47 USC 160(a) could give rise to claims that Sections 160(a) and (e), read collectively, effectively rescind the Pennsylvania-specific merger conditions that the PaPUC imposed on Verizon in Verizon's recent merger with MCI.

The PaPUC already asked the FCC to address this issue in the Reply Comments of the PaPUC in the pending Motion of Covad, et. al at WC Docket No. 04-440.<sup>4</sup> In that docket, Covad and others want the FCC to issue a written order that modifies, clarifies or rescinds the "Verizon forbearance by operation of law" result.

There, as here, the PaPUC wants the FCC to expressly state that any forbearance granted under Section 160 does not undermine, modify, rescind, or preempt any condition or obligation imposed as a matter of independent state law on a recipient of FCC forbearance.

The PaPUC has taken this position because the PaPUC imposed Pennsylvania-specific conditions on Verizon. Those conditions mirror FCC conditions imposed on Verizon in the Verizon-MCI merger Order at WC Docket No. 05-75 by Order released November 15, 2005 (the FCC Merger Order). The PaPUC Merger Order approved the Verizon-MCI merger at PaPUC Docket No. A-310580 et. al entered on January 11, 2006.

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<sup>4</sup> *Petition of Verizon Telephone Companies for Forbearance Under 47 USC § 160(c) From Title II and Computer Inquiry Rules*, WC Docket No. 04-440, Motion of Covad, et. Al for Expedited Order on Verizon Petition for Forbearance, Reply Comments of the PaPUC, pp. 2-4.

The PaPUC Merger Order approved the merger, with conditions, as an integral part of a determination that the merger provided substantial benefit to the public as required by state law. For this reason, the FCC must address how this forbearance stands as precedent for other pending forbearance petitions. The FCC must hold that any forbearance requests it grants does not undermine, modify, rescind, or preempt any condition or obligation imposed as a matter of independent state law on a recipient of FCC forbearance.

To accomplish that, the FCC must reconsider the Omaha Forbearance Order. The PaPUC opposes any result which puts Pennsylvania-specific conditions or obligations at risk. That includes the forbearance granted in this docket as well as the forbearance requested in the pending Verizon forbearance proceeding. This is necessary to avoid rescinding or putting independent state decisions at risk by claims that Sections 160(a) and (e), read collectively, preclude independent state action.

The PaPUC also supports the Comment of Earthlink. Earthlink shares the PaPUC's concern that questionable predictive judgments in this case cannot stand as the basis for any forbearance sought by Verizon in six MSAs, including Pittsburgh and Philadelphia. The PaPUC agrees with Earthlink that the FCC has a duty to reconsider forbearance in this case, including the impact that forbearance has on independent state law.

Further, the Comments in this docket identify three important post-forbearance developments which demonstrate that the narrower Omaha forbearance has not worked as out expected.

The non-negotiable rates Qwest has offered McLeod involve monthly recurring price increases over the UNE rates ranging from 30% for stand alone DSO loops to 138% for DS1 loops in one wire center to 151.5% for DS1 loops in 5 wire centers and to 165% for DS1 loops in the remaining three wire centers.<sup>5</sup> These price increases were imposed in standard boilerplate commercial agreements.<sup>6</sup> Qwest has demanded that McLeod waive its rights under the Qwest Performance Assurance Plan and other wholesale quality service standards in order to secure a new rate for stand alone DS0 loops that are 30% over the UNE DS0 loop rate.<sup>7</sup> The alternative to these “commercial agreements” for stand alone DS0 loops is a special access rate in which the monthly recurring special access rate is 234% higher than the UNE rate and the special access DS0 loop non-recurring charges are more than 11 times higher than the UNE non-recurring charges.<sup>8</sup>

The PaPUC also takes this position in light of the Comment of the Telecom Investors. The PaPUC shares the concern that forbearance in this case is just the tip of a spear aimed at much larger competitive investments in larger markets.<sup>9</sup> The PaPUC already recognizes that the impact from forbearance in the Philadelphia and Pittsburgh MSAs, among others, would be far more extensive than in Omaha.<sup>10</sup>

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<sup>5</sup> Comptel Comment, p. 2.

<sup>6</sup> Comptel Comment, p. 2.

<sup>7</sup> McLeod Petition Eben Declaration at paragraph 24 and Exhibit 3, Appendix 4 at 4.6.

<sup>8</sup> Comptel Comment, p. 5.

<sup>9</sup> Comment of Telecomm Investors, WC Docket No. 04-223, p. iv.

<sup>10</sup> Compare *PaPUC Comments*, WC Docket No. 06-172, pp. 16-18 with *Comment of Telecomm Investors*, WC Docket No. 04-223, p. iv.

The PaPUC concludes that the FCC has authority to reconsider, modify, or rescind this forbearance decision. The PaPUC urges the FCC to hold that any forbearance requests it grants does not undermine, modify, rescind, or preempt any condition or obligation imposed as a matter of independent state law on a recipient of FCC forbearance.

The PaPUC thanks the FCC for providing the PaPUC with an opportunity to file a Reply Comment.

Respectfully submitted,  
Pennsylvania Public Utility Commission

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